

Virginia's Primary Dunes: Demolition by Neglect

Disclaimer: The content of this report was produced by College of William & Mary Law Student, Ben Willis, during an internship with the Accomack-Northampton Planning District Commission in June, 2015. The content and views presented within the report do not necessarily reflect the official views or policies of the Accomack-Northampton Planning District Commission.

The Virginia Coastal Primary Sand Dune and Beach Act ("Dune and Beach Act") tasks the Virginia Marine Resources Commission (VMRC) with the protection of primary dunes and their ecosystems. This is accomplished through a permitting process for any activity involving or impacting primary dunes. However, the act is silent on the indirect destruction of dunes as a consequence of human inaction or landowner neglect. Mr. Neville has requested an analysis of this issue and whether the legal doctrine of demolition by neglect could be applied to further protect our primary dune systems. My conclusion is that the Dune and Beach Act does not address dune destruction by natural forces or indirect human influence, and changes to either the Act or the VMRC guidelines would be required to properly apply the doctrine of demolition by neglect.

Background

The legal doctrine of demolition by neglect appears in the context of preservation of historical landmarks. Local, state, and federal regulations all call for the preservation of historic landmarks, but the amount of regulatory power over landowners varies at each level. Many historical preservation statutes prevent the human modification of a historical structure through permitting and zoning schemes but do not address normal decay or destruction by storm events. Consequently, some landowners try to escape their historical designation by allowing their property or building to fall into such a state of disrepair that it no longer qualifies as an historical landmark. The demolition by neglect doctrine formed to address this practice and better preserve our nation's historic landmarks. The doctrine recognizes that destruction of an historical landmark due to neglect is just as much a threat as active human modification, and therefore should be treated and regulated equally.

In Virginia, several localities have adopted demolition by neglect ordinances which require active maintenance of historical landmarks and even reconstruction in certain cases. In Charlottesville, the owner of an historic landmark shall not, "permit such structure, landmark or property to fall into a state of disrepair," and upon notification of failure to maintain or repair they "shall have sixty days to remedy such violation."¹ Virginia courts have upheld these ordinances as valid under the state enabling legislation (Sec. 10.1-2200 through 10.1-2214).² The legislation did not give localities this power directly, but instead created the Department of Historic Resources which would promulgate new regulations and aid localities in creating ordinances. From this broad grant of authority, the DHR gave localities a fair deal of discretion in crafting historic preservation ordinances.

The enabling legislation behind this historic preservation framework is critical to the success of the demolition by neglect doctrine in Virginia. Virginia uses the Dillon's Rule form of government, under which the State is the ultimate source of authority and local government is only granted those powers

¹ Section 31-141: *Maintenance and repair required*; <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/resources/Demolition-By-Neglect.pdf>

² *Harris v. Parker*, Chancery No. 3079 (Isle of Wight County, Va., Cir. Ct. Jan. 20, 1983).

expressly named or necessarily implied by the Constitution or the laws of the General Assembly. Thus without the proper enabling legislation, localities would not have the authority to regulate the inactivity that lies at the heart of demolition by neglect.

Could demolition by neglect be applied to preservation of sand dunes and barrier islands?

Under the current iteration of the Dune and Beach Act, the demolition by neglect doctrine could not be applied to natural resources. The Dune and Beach Act, VAC §28.2-1400 through §28.2-1420, authorizes certain localities to adopt a coastal primary sand dune ordinance, but the localities must adopt the *exact* wording of the model ordinance provided in the statute.³ The ordinance allows localities to form a wetlands board in charge of approving or denying sand dune permits, but makes no additional grant of power. Moreover, it is clear that VMRC has the ultimate authority over primary sand dunes, as they are tasked with promulgating further regulations on the use of primary sand dunes and can overturn decisions made by the individual wetlands boards. This isn't necessarily fatal, since the role of the DHR in historical resources is very similar. However, while DHR has issued guidelines and regulations clarifying that localities *can* take affirmative action and pass demolition by neglect ordinances, VMRC has done the exact opposite; they issued guidelines⁴ which clearly state that artificial means of dune preservation are contrary to the intent of the Dune and Beach Act. And while DHR delegated much authority to localities, VMRC has retained complete control.

While the current Dune and Beach Act does not support affirmative maintenance of sand dunes, given the right state enabling legislation the demolition by neglect doctrine could be used to protect natural landmarks such as primary sand dunes. Demolition by neglect deals with the failure to act, and there are certain cases in which inaction would certainly cause the degradation or destruction of an ecosystem. Sand dunes and barrier islands are problematic examples, since dune renourishment efforts can have a profound impact on the long-term geology of the area.⁵ In many cases, it is very difficult to confidently say whether renourishment or overwash is the proper strategy. However, if human development has left no viable path for inward migration of the sand dunes or island and failure to maintain the dunes would result in irreparable habitat loss, then certainly inaction has substantively the same effect as the human actions addressed by the Dune and Beach Act. Consequently, it is reasonable for certain localities, especially those in which natural progression is illogical or infeasible, to regulate the failure to maintain dunes and barrier islands in the same way they would regulate development or human alteration of those same ecosystems.

What changes to the Virginia legislation would be needed to clarify this intent?

Proper enabling legislation for a demolition by neglect ordinance would need to include an affirmative maintenance provision and allow localities to choose whether to exercise the power. Without an affirmative maintenance provision, it is incredibly unlikely for Virginia courts to find that a locality has the power to regulate inaction of public or private landowners. This change would be best made in the body of the Dune and Beach Act, but it could be effective if made by VMRC in their

³ "The following ordinance is the only coastal primary sand dune zoning ordinance under which any board shall operate after October 1, 1992."

⁴ See http://www.mrc.virginia.gov/regulations/dune_guidelines.pdf

⁵ Robert Dolan, The Outer Banks of North Carolina: Professional Paper 1177-B, USGS (1986), <http://pubs.usgs.gov/pp/1177b/report.pdf>.

guidelines (similar to DHR in their guidelines). To be safe, the model primary dune ordinance provided in the Dune and Beach Act would either need to be done away with, or a model affirmative maintenance provision could be added.

Though the Dune and Beach Act specifically states that VMRC “shall preserve and protect coastal primary sand dunes and beaches and prevent their despoliation and destruction,” the legal intent of the legislation was to prevent the *manmade* or *artificial* destruction of the primary dunes. In addition to resolving the issues set out above, the General Assembly would do well to clarify the intent of the Dune Act as including all forms of despoliation or destruction.

Other Issues

While the demolition by neglect doctrine could be applied to natural resource laws, several issues would be raised in doing so. First, the maintenance of primary dunes can be an extremely costly process. Generally speaking, if the cost of an imposed regulation outweighs or removes the total value of the land, there is a good chance that a regulatory taking has occurred. In these cases, courts could require the locality or state to either make an exception for the property or exercise eminent domain to obtain the property themselves. Second, a local demolition by neglect ordinance could still be preempted by a whole slew of state and federal natural resource laws. Given the fact that many primary sand dune and barrier island systems across the country are owned by federal and state governments, the possibility for widespread government exemptions undermines the ordinance and makes it more susceptible to legal challenges by private landowners.

Conclusion

In answer to Mr. Neville’s inquiry, it is clear that the current Dune and Beach Act does not support the doctrine of demolition by neglect. In order for the doctrine to be implemented for primary sand dunes, revisions must first be made to the Dune and Beach Act and VMRC would need to alter their guidelines. Even then, legal challenges and government exemptions would curtail the efficacy of the doctrine. Despite these pitfalls, demolition by neglect certainly has a logical place in natural resources law and if handled correctly could be a very effective tool for controlling neglectful or absentee landowners. Primary sand dunes and barrier islands that are unable to migrate naturally would undoubtedly benefit from an affirmative maintenance ordinance. However, it would be absolutely necessary to distinguish dunes and barrier islands in need of maintenance from those that need to migrate; preventing the natural progression of an unspoiled barrier island can be equally destructive in the long run.

Could the legal principle of ‘Demolition by Neglect’ be applied to the protection of sand dunes under the enforceable policies of the Virginia Coastal Primary Sand Dune and Beach Act?

Problem Statement:

Sand dunes associated with a coastal barrier island system are generally recognized as a valuable natural resource which indicates a healthy resilient ecosystem. Barrier islands are considered to be a dynamic environment subject to change and have been identified to be at risk from sea level rise and increased coastal storms. Management of this resource varies from ‘hard engineering’ to a philosophy of ‘let nature take its course’ with a new ‘hybrid’ approach which calls for active intervention with natural and nature based solutions to reduce risk and promote resiliency in the face of climate change.

Virginia law (Sec. 28.2-1400 through 28.2-1420) is intended to prevent the destruction or alteration of primary sand dunes, however according to Hank Badger with VMRC, it does not require ongoing management, maintenance, or restoration. For federal or state agencies, NGOs and private property owners who have a responsibility for the care and protection of coastal natural resources, taking no action to manage, maintain or restore dunes within a natural range of ecological succession could be considered demolition by neglect under the Virginia ‘Dune and Beach Act’.

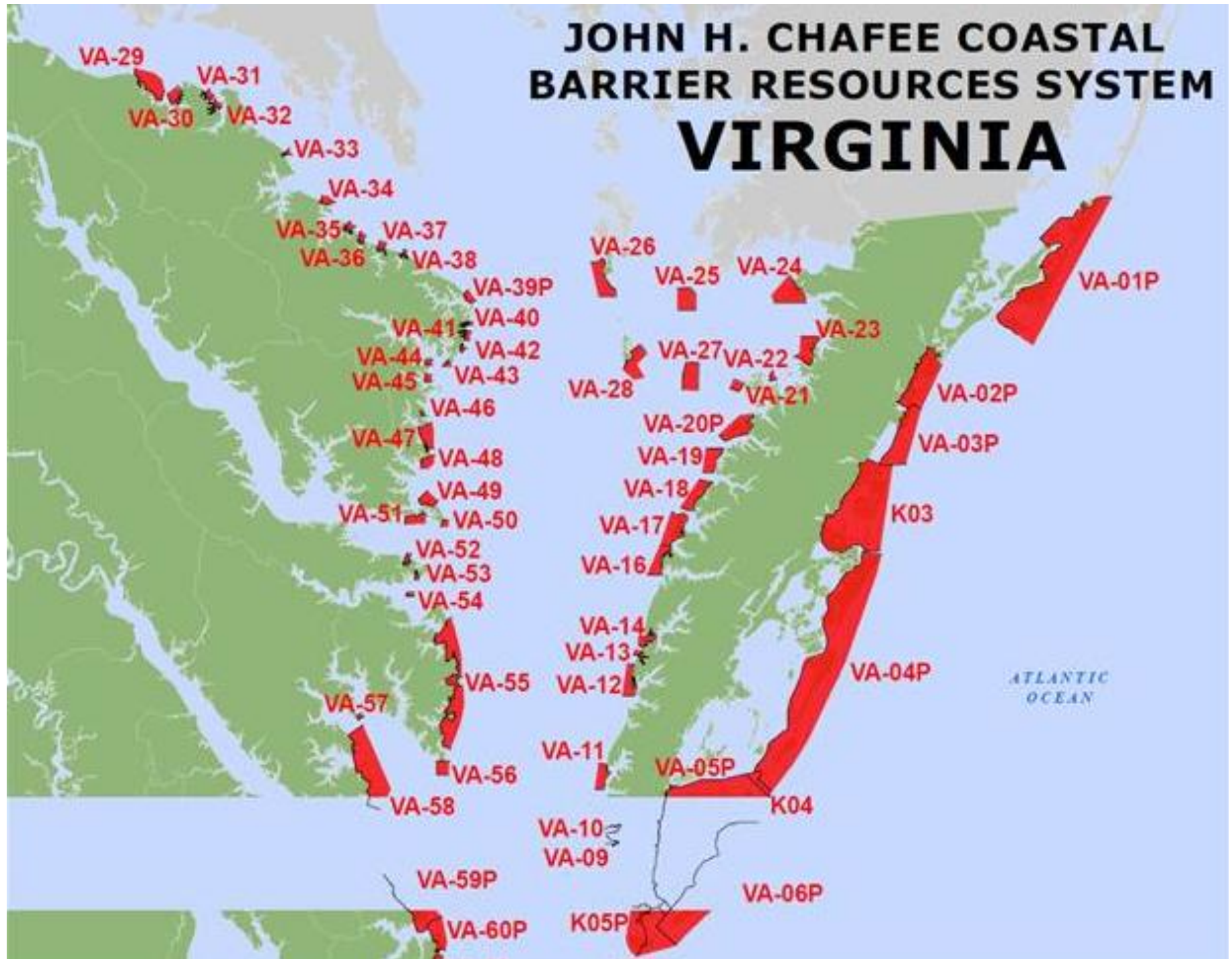
- Could the principles established for management of historic resources be applied to management of natural resources that are clearly held in the public trust?*
- Are the CBRA and its mapped areas equivalent to an historic district when it comes to administering resource preservation policies?

‘In 1982, Congress enacted the Coastal Barrier Resources Act (CBRA, Public Law 97-348; 96 Stat. 1653; 16 U.S.C. 3501 et seq.), which was later amended in 1990 by the Coastal Barrier Improvement Act (CBIA, P.L. 101-591; 104 Stat. 2931). The legislation was implemented as part of a Department of Interior (DOI) initiative to preserve the ecological integrity of areas that serve to buffer the U.S. mainland from storms and provide important habitats for fish and wildlife.’

- Would changes to the Virginia legislation be needed to clarify this intent?
- Is the Dune and Beach Act, along with the NEPA requirement for federal consistency with the Virginia Coastal Zone Management Program sufficient to preserve and protect Virginia’s barrier island system?

*USFWS complicates the public trust doctrine by identifying selected plants and animals (along with their critical habitats) as ‘trust species’ under the Endangered Species Act. The Town of Chincoteague identified conflicting management objectives in the draft Chincoteague NWR CCP/EIS which seek to create and maintain a destructive primary phase of ecological succession on Assateague Island in order to support habitat for ‘trust species’. The destruction, or demolition, of dunes and their stabilizing vegetation was proposed under the FWS draft habitat management plan. USFWS refuge staff indicates that the final CCP will include language which confirms that they will ‘take no action’ to prevent natural processes that cause breaches, overwash and dynamic beach conditions.

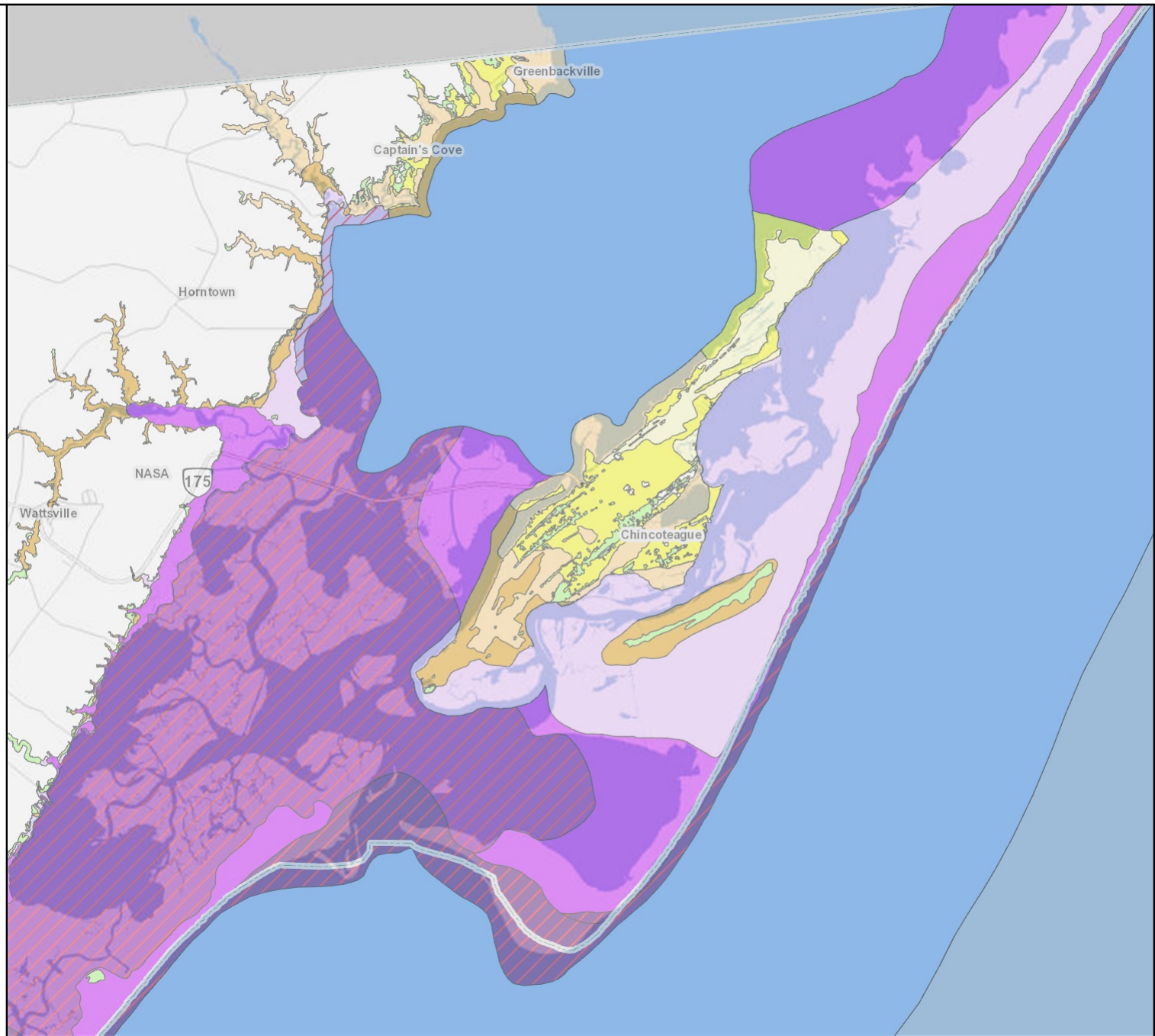
JOHN H. CHAFEE COASTAL BARRIER RESOURCES SYSTEM VIRGINIA



Legend

County Boundaries
Road Labels
Special Flood Hazard Area -
Preliminary 2014

- VE, 12 BFE
- VE, 11 BFE
- AE, 10 BFE
- VE, 10 BFE
- AE, 9 BFE
- VE, 9 BFE
- AE, 8 BFE
- VE, 8 BFE
- AE, 7 BFE
- VE, 7 BFE
- AE, 6 BFE
- VE, 6 BFE
- AE, 5 BFE
- VE, 5 BFE
- AE, 4 BFE
- AE, 3 BFE
- 0.2% Annual Chance
- Not In Flood Zone (X)
- Open Water



Map Printed from AccoMap
<http://accomack.mapsdirect.net/>

Miles
0 .5 1 1.5 2
1:144,448 / 1"=2 Miles

Title: RiskMAP Flood Risk Map

Date: 4/24/2015

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